Author: stuart_buck@ck6.uscourts.gov at ~Internet
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Normal
TO: Rules Comments at AO-OJPPO
Subject: Proposed change to Rule 22 of the FRAP
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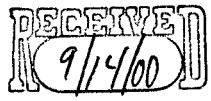

00-AP-C

Stuart Buck
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To the Committee:

I have briefly examined the proposed changes to the Fed. Rules of Appellate Procedure. I did not notice any changes to Rule 22 -- which is why I write.

As you know, the AEDPA changed the requirement for appealing a district court's habeas corpus ruling -- formerly, the petitioner had to get a certificate of probable cause under Section 2253(c), whereas now the petitioner has to get a certificate of appealability under that same section. The new certificate of appealability is granted according to the same substantive standard ("substantial showing of the denial of a constitutional right"), but has a new requirement that the certificate name the SPECIFIC issues to be appealed.

There is currently a circuit split on what to do procedurally when a district court has granted a certificate of probable cause but a certificate of appealability is actually required. Such situations will probably arise even more often now that the Supreme Court has held in Slack v. McDaniel, 120 S.Ct. 1595 (2000), that all appeals undertaken after April 24, 1996, must be done pursuant to a certificate of appealability even if pre-AEDPA substantive law applies because the habeas petition was filed prior to April 24, 1996.

The Fifth Circuit has held that it must remand such cases to the district court for a certificate of appealability. Muniz v. Johnson, 114 F.3d 43 (5th Cir. 1997); Hill v. Johnson, 114 F.3d 78 (5th Cir. 1997). Similarly, the Sixth Circuit has said that it lacks authority under Rule 22 to consider whether to grant a certificate of appealability unless the district court has actually denied one. Lyons v. Ohio Adult Parole Authority, 105 F.3d 1063, 1076 n.18 (6th Cir. 1997).

By contrast, the DC, Second, Third, and Eleventh Circuits (and possibly more) have held that they can treat the certificate of probable cause as a certificate of appealability. See Byrd v. Henderson, 119 F.3d 34, 36 (D.C. Cir. 1997); Smith v. Ross, No. 96-2441, 1997 U.S. App. LEXIS 12329, at *2 - *3 (2d Cir. 1997); Banks v. Horn, 126 F.3d 206, 210 (3d Cir. 1997); Franklin v. Hightower, 215 F.3d 1196 (11th Cir. 2000). The Eleventh Circuit, interestingly, found the power to do this in Rule 27 of the Rules of Appellate Procedure, which allows a court to "review the action of a single judge." More strikingly, the Third Circuit actually decided to "treat the certificate of probable cause as BOTH a certificate of probable cause and a certificate of appealability." Banks, 126 F.3d at 210 (emphasis added).

Thus, I would suggest an amendment to Rule 22 which would clarify what circuit courts can do in this situation. Here are some possible sentences that might be added at the end of 22(b)(1):

A) "If a district judge has granted a certificate of probable cause where a certificate of appealability would be required, the circuit judge or judges may treat the certificate of probable cause as if it were a certificate of appealability naming all the issues for appeal."

B)"If a district judge has granted a certificate of probable cause where a certificate of appealability would be required, the circuit judge or judges may consider whether or not to grant a certificate of appealability."

I hope that this letter is of some assistance in addressing this confusing issue.

Sincerely,

Stuart Buck